

This is not the End: What lies ahead for the VDL Commission in terms of Brexit

Joelle Grogan

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Brexit is the '[shock](#)' that united Europe according to the President-elect of the Commission, Ursula von der Leyen. There's certainly an element of truth to this. Despite some [occasional signs of disagreement](#), the EU-27 have given every show of maintaining a unified position in all stages of the Brexit process so far. This is in clear contrast to the UK, as three years of uncertainty and disagreement have coalesced into a toxic mix of political and legal dysfunction, leaving the country so divided as to cause UK authorities to lurch from one crisis to the next. The UK is currently scheduled to withdraw from the EU on 31 January 2020. This deadline, however, is no more certain than the last three Article 50 TEU deadlines, as the general election (the second since Article 50 TEU was triggered in March 2017 and which has put temporary pause to Brexit negotiations) may not provide any resolution either in the short or medium term.

Briefly, a Conservative majority would likely result in the ratification of the current Withdrawal Agreement on or before 31 January 2019, but could also mean the increased [likelihood](#) of a 'no deal' Brexit at the end of the transition period which follows it. A UK government led by the Labour party could mean a request to the EU-27 for a *further* extension in order to renegotiate the Withdrawal Agreement and/or facilitate a further referendum on EU Membership. Although highly unlikely, an alternative 'Remain' government could be elected to revoke the Article 50 TEU notification and stop Brexit entirely. Another possible result, however, is another hung Parliament: a government leading Brexit negotiations without a majority of support in Parliament. With only four weeks before a general election, there's little certainty as to what the 2019-2024 (at least on [paper](#)) UK government will be.

If, however, the Withdrawal Agreement is ratified following the election of a parliamentary majority favourable to it, the VDL Commission will be then tasked with the most challenging part of negotiations: the agreement on the future relationship between the UK and the EU. It is at this point that 'unity' or a common position among the EU-27 is both most essential and most challenging. Concurrently with Brexit negotiations, two Member States, [Hungary](#) and [Poland](#), are subject to special EU scrutiny under Article 7(1) TEU for breaches of the EU's fundamental values such as the rule of law. It was never expected that either Article 50 TEU nor Article 7 TEU would be activated, and certainly never all at the same time.

Regarding the rule of law, strong [concerns have](#) been [raised](#) with regard to von der Leyen's '[unclear](#)' position on upholding fundamental values, and her ostensible if not pusillanimous deference to [dialogue](#) to avoid an '[East/West rift](#)' on matters of the rule of law as '[nobody's perfect](#)'. There may be a tempting political expediency of prioritising a unified position on Brexit (no doubt in 'protection of the European project as a whole') above holding individual Member States' governments' to

account for measures which further and entrench [rule of law backsliding](#). There are few indications, as of yet, of von der Leyen's stance on the question of Brexit, beyond the intention to '[strive for an orderly Brexit](#)' ([echoing the language](#) of former UK prime minister, Theresa May which of itself is no more meaningful than 'Brexit means Brexit'). She has also reiterated the commitment of the last Commission to show solidarity with Member States most effected by Brexit. She stated it '[would be wrong to see Brexit only as the end of something](#)', underlining the importance of the way in which the Brexit process is carried out will be determinative of the future relationship. While a commentator for [Brexit Central](#) celebrated her appointment as one to '[stand-up against the Commission Establishment](#)' and not aim to 'make an example of' the UK, there's little from which to discern that the VDL Commission strategy will in any way be a departure from that of the Juncker Commission.

The way in which negotiations are conducted, the content of those agreements, and the necessary compromises both internally within the Union and bilaterally with the UK will present complex challenges from a rule of law perspective for the VDL Commission. This post aims to outline only some of those challenges, and highlight outstanding issues, in the years of the Brexit process ahead.

Brexit can *always* deliver delays

Familiar to Brexit, the 2019-2024 European Commission led by von der Leyen has been delayed. The VDL Commission was due to be in position by 1 November 2019, but was postponed by a month following the [rejection](#) of three commission nominees. Despite the [contentious approval](#) of the (second) Hungarian nominee to lead a portfolio requiring *inter alia* the promotion of values which the Hungarian government is credibly accused of having [systematically violated](#), von der Leyen still does not have a full College of Commissioners as the UK government has refused to nominate one, triggering an [infringement action](#) initiated by the Commission. While the UK government has cited the prohibition on nominating senior international posts in advance of a general election, the UK government's (political) intransigence on this EU legal obligation predates the election period. The European Council made the appointment of a Commissioner [a condition](#) of a [further extension](#) to January 2020, as such an extension of UK membership 'cannot be allowed to undermine the regular functioning of the Union and its institutions'.

The prohibition on senior international appointment during an election is, in any event, as convincing as the rationale Johnson put forward to [prorogue the Parliament](#), and which the UK Supreme Court found to have been '[unlawful, null, and of no effect](#)'. The CJEU has [held](#) that no provision (even a constitutional one) can justify a failure to observe EU obligations. While [some](#) have argued that the lack of a UK Commissioner under such circumstances should not, and will not, prevent the confirmation of the VDL Commission, for there to be such an exception could create an [unwelcome precedent](#). It is not in the interests of either the EU Institutions or the Member States for a Commission to be (legally) functional without representation of *all* Member States.

A Tailor-Made Approach to Transparency

Acting under a negotiation mandate of the European Council, the Commission leads negotiations on behalf of the EU. UK attempts to undermine this role by negotiating directly with individual Member States have been unsuccessful as the EU-27 have [‘maintained extraordinary self-discipline and loyalty among themselves.’](#) Essential to this unity has no doubt been the transparency of Juncker Commission’s work during negotiations, early [called for](#) by the European Parliament.

Due to the ‘unprecedented’ nature of the Brexit negotiations, the Juncker Commission adopted a [‘tailor-made’](#) approach to transparency. Documents shared among Member States and EU Institutions and with the UK have been [publicly released](#) including meeting agendas, position papers, and text proposals. For Brexit legal commentators, such an accessible source of information has been a welcome relief and contrast to the years of unpublished, inconsistent, and often contradictory positions and [‘non-papers’](#) taken by the five different UK Brexit Ministers and chief negotiators since 2016. As highlighted by the Commission in the [European Ombudsman](#) report on their work, the approach taken to transparency **‘served to enhance the legitimacy of the Commission and the EU in these negotiations. It has also helped keep the EU united as all key stakeholders were informed at every step.’**

Such transparency is rightly to be lauded, and it should be equally a priority of the VDL Commission. It does, however, stand in stark contrast to the [lack of transparency](#) in the Commission’s actions taken under the rule of law framework, and latterly under the Article 7(1) TEU procedures on Poland and Hungary. Where the legitimacy of the Commission and EU are enhanced, and unity served by such clear and public disclosures, it seems incongruent that measures taken by the Commission where there is ‘clear risk of serious breach’ of EU values and Member State responses to them are largely publicly unknowable. The wealth of information on Brexit negotiations and preparations for ‘no deal’ eventualities [centrally published](#) by the Commission, serve only to highlight the poverty as regards information on actions taken with regard to corruption and rule of law infringement actions. As Laurent Pech [writes](#), there can be no ‘more pressing overriding public interest than a situation in which the existence of a clear risk of a serious breach of the EU’s foundational values is alleged in respect of a Member State.’ Perhaps the rule of politics is clear on this one: when a Member is leaving, values are unifying; but for Member States remaining, such same values are seen (unjustifiably) as [divisive](#).

The Withdrawal Agreement

The “[new](#)” draft [Withdrawal Agreement](#), now in stasis during the UK general election, received [positive assessment](#) from von der Leyen who called it ‘good for people and good for the single market’. It was agreed in principle between Boris Johnson’s government and Commission negotiators only two weeks before the then Article 50 TEU deadline of 31 October 2019. However, even where the draft Withdrawal Agreement finalised between UK and EU negotiators is [largely the same](#) as that

negotiated by Theresa May, it was not given anywhere [near adequate time](#) for sufficient consideration to be done by the UK and EU Parliaments both of which were required to give their consent for the Agreement to be ratified. Only a few of the issues from a rule of law perspective are herein outlined.

First, the most significant change of the WA was the introduction of the [Northern Ireland Protocol](#). Despite its statements on the customs unity of the UK, the Protocol will in [practical effect](#) separate Northern Ireland from the rest of the UK on matters of customs, excise, state aid, in addition to certain annexed regulatory regimes. Though considered a [success for Ireland](#) in that it would negate the need for a regulatory and customs border on the island, the practical arrangements and detail as to the workability of the agreement have not yet been sufficiently clarified leaving significant scope for ongoing legal uncertainty for citizens and businesses. For example, the definition of 'goods' 'at risk' of being moved into the EU from Great Britain or a third country via Northern Ireland and so subject to tariffs to be decided by a Joint Committee is still unknown.

The Protocol will guarantee continued, if not [indefinite](#), CJEU oversight. Northern Irish Courts will have capacity to refer questions to the CJEU under the Article 267 TFEU mechanism. Such EU judicial oversight in some areas and in one part of the UK, could create a significant degree of legal uncertainty and compounds the likelihood of regulatory and wider legal divergence within the UK. Uncertainty will also arise where there are legal disputes in areas which are covered (eg EU state aid provisions) and not covered (eg competition law prohibition of cartels) by the Protocol.

A [compromise](#) to the UK red line on the CJEU, a new Joint Committee chaired by both UK and EU representatives will oversee the implementation of the Withdrawal Agreement, and be able to adopt binding decisions amending the Agreement. The detail as to how it will be constituted, how often it will meet beyond 'at least once a year', and the range and extent of its duties has left much to be desired and more to be concerned about. The functional capacity of the Joint Committee as oversight body of the *entire* Withdrawal Agreement is limited, which is of particular concern to for the protection of resident EU citizens' rights in the UK, as of those of UK citizens resident in the EU. Regarding EU citizens in the UK alone, significant concerns remain regarding the open ended nature of the terms used in regards to citizens' rights, the diminution of family and [workers'](#) rights, lack of recognition given to [unprotected groups](#), the lack of physical documentation to prove status, reliance on a [data-leaking](#) and [insecure](#) phone app, the lack of access to justice and judicial review for administrative error, the end of non-discrimination, the reduction and removal of democratic voting rights for EU and local elections, and the overall and permanent insecurity of reliance on secondary legislation to incorporate citizens' rights which can be changed by delegated legislative powers of a government minister.

Even where the WA is ratified: these issues have not been resolved.

This is only the beginning

If the Withdrawal Agreement is ratified on or before 31 January 2020, the UK will withdraw from the EU and the next transition period will begin, ending in December 2020. Article 218 TFEU, rather than Article 50 TEU, will determine the process of negotiations, and the VDL Commission will have only 11 months to negotiate with the UK the conclusion of an agreement on the future relationship [spanning](#) *inter alia* trade and economic cooperation, mobility, transport and aviation, data transfer, services and investment, ensuring a level playing field for fair competition, law enforcement and criminal justice, and even matters of foreign policy, security and defence. Finding optimal positions and conditions on the UK's continued access to the internal market which neither compromise the functioning of the Single Market and the four freedoms, nor incentivises bilateralism through the alienation of Member States, nor causes severe economic damage to the UK and the EU, will be a herculean task for the VDL Commission to say the least.

Already raised as a concerning point of contention is the move of the guarantee of a level playing field from the legally-binding Withdrawal Agreement to the Political Declaration on the future relationship between the UK and EU. [Plausibly](#), the UK could adopt lower standards on consumer, worker, environmental protections than those within the EU in effort to attract trade and investment, putting closer neighbours at an extreme competitive disadvantage which could incentivise some Member States to push for a similar regulatory trajectory. Similar concerns for legal certainty, judicial review, and democratic input within the Withdrawal Agreement will be compounded in a future agreement between the UK and the EU *particularly* where time is even shorter. The transition period may only be extended once by two years to December 2022. This timeline for negotiations will be determined by the Withdrawal Agreement, not Article 50 TEU. There is no mechanism for extension by request of the UK and unanimous approval of the Council under the Withdrawal Agreement.

In saying that it is wrong to think of Brexit as an ending, von der Leyen was entirely apt: these past three years have only been the beginning. The next five years of the VDL Commission will be dominated by the opposing and existential challenges of one Member State withdrawing and other Member States departing from the fundamental values of the European Union. How ultimately the VDL Commission will be characterised will depend on whether it chooses unity with values, or over them.

